

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FRANK WHALEN, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 02-246-JJF
	:	
CORRECTION MEDICAL SERVICE,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	

Frank Whalen, Jr., Pro Se Plaintiff

Kevin J. Connors, Esquire of MARSHALL, DENNEHEY, WARNER, COLEMAN
AND GOGGIN, Wilmington, Delaware.
Attorney for Defendants Correctional Medical Service and Melody
Thorpe, N.P.

MEMORANDUM OPINION

August 18, 2003
Wilmington, Delaware

FARNAN, District Judge

Pending before the Court is Defendant Correctional Medical Services' ("CMS") Motion to Dismiss Plaintiff's Complaint (D.I. 23). For the reasons discussed below, the Court will grant the Motion.

Plaintiff filed a pro se Complaint (D.I. 2) alleging that Defendants CMS, Dr. Keith Iven, and Nurse Melody Thorpe violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to provide adequate medical treatment.¹ Specifically, Plaintiff contends that Defendants refused to perform back surgery on Plaintiff, caused Plaintiff to suffer a narcotic overdose, and discontinued the administration of necessary pain medication.

Subsequently, CMS filed a Motion (D.I. 23) seeking to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).² CMS contends that Plaintiff's Complaint fails to state a claim upon which relief can be granted because CMS cannot be held responsible for the acts of its employees, Dr. Ivens and Nurse Thorpe, under a theory of respondeat superior in

¹ Plaintiff's Complaint originally named Kathy English and Governor Ruth Minner as Defendants, but the Court granted their Motion to Dismiss in a prior Order (D.I. 32).

² CMS also moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) contending that Plaintiff failed to exhaust his administrative remedies; however, CMS withdrew this ground for dismissal in a subsequent submission (D.I. 28).

a Section 1983 action and because Plaintiff's injury was not caused by a policy or custom of CMS's that demonstrates deliberate indifference to Plaintiff's serious medical needs.

In response, Plaintiff contends that dismissal is inappropriate because CMS acted with deliberate indifference by failing to remedy a continuing or egregious wrong after learning of a violation. Specifically, Plaintiff contends that CMS knew of Plaintiff's serious back condition and his need for surgery and opted to medicate him rather than provide the surgery.

When a court analyzes a motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the factual allegations of the complaint must be accepted as true. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). The court must draw all reasonable inferences in favor of the nonmoving party. Id. In sum, the only way a court can grant a Rule 12(b)(6) motion to dismiss is "if it appears that the [nonmoving party] could prove no set of facts" consistent with the allegations that would entitle it to relief. Id.

CMS cannot be held liable under a theory of respondeat superior but can be held liable for a policy or custom that demonstrates deliberate indifference. Miller v. Correctional Medical Systems, Inc., 802 F. Supp. 1126, 1131-32 (D. Del. 1992) (citing Monell v. Department of Social Services of New York, 436 U.S. 658 (1978)); see also Gregory v. PHS Inc., 2001 WL

1182779, at *4 (D. Del. Sep 21, 2001); Swan v. Daniels, 923 F.Supp. 626, 633 (D. Del. 1995). In order to hold CMS liable, therefore, Plaintiff must show that CMS has an established "policy" or "custom" that resulted in a deliberate indifference to plaintiff's serious medical needs.

"Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy or edict." Miller, 802 F. Supp. at 1132 (citations omitted). "Custom, on the other hand, can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." Id.

In the instant case, the Court concludes that Plaintiff has not alleged, nor could he prove any set of facts that would demonstrate, the existence of any CMS policy or custom that led the medical staff to deprive him of necessary medical care. To state a claim, Plaintiff would have to demonstrate that CMS has a policy or custom of not providing necessary medical care to inmates. Thus, even if the surgery was medically necessary and the treating physician failed to provide it, CMS would not be liable unless it had policy or custom that encouraged or otherwise caused its physicians to not provide such necessary services. Here, Plaintiff admits that he received treatment for

his back pain, although not the treatment he deems most appropriate. In the Court's view, the decision to not operate is not a policy or custom, but merely a disagreement over the course of medical treatment which does not rise to a constitutional issue.

[W]hen a medical professional simply chooses between two equally appropriate forms of treatment, there is no constitutional violation even though the prisoner may not agree with or be displeased by the doctor's course of action. Likewise, a disagreement between two physicians over the proper course of treatment does not give rise to a constitutional violation since '[t]here may ... be several acceptable ways to treat an illness.'

Key v. Brewington-Carr, 2000 WL 1346688, at *11 (D. Del. Sept. 6, 2000) (quoting White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990)) (citations omitted). Accordingly, the Court will dismiss Plaintiff's Complaint against CMS.

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CORRECTION MEDICAL SERVICE,	:	
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	:	
Defendants.	:	

ORDER

At Wilmington this 18th day of August 2003, for the
reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant Correctional Medical
Services' Motion to Dismiss Plaintiff's Complaint (D.I. 23) is

GRANTED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE